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C. P. [signature]



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: H.V. Allen Co., Inc.

File: B-225326, B-225327, B-225879

Date: March 6, 1987

DIGEST

1. Contracting agency's decision to proceed with bid opening under invitation for bids (IFB) in face of protest filed with agency before bid opening constitutes adverse agency action on protest, and subsequent protest to General Accounting Office is untimely where filed more than 10 working days after bid opening.

2. Protester qualifies as interested party despite its status as fourth low bidder where protester seeks resolicitation of procurement on the basis of defective specification and would have an opportunity to rebid if the procurement were resolicited.

3. Under IFB for installation of fire sprinkler system, contracting agency properly may include requirement that contractor have state fire sprinkler contractor's license (1) in the interest of avoiding possible interruption to contract performance due to state's efforts to enforce licensing requirement; and (2) where seismic area in which agency facilities are located requires special technical skills on part of sprinkler contractor which contracting officer decides are best assessed by state board through the licensing process.

DECISION

H.V. Allen Co., Inc. protests any award under three solicitations issued by the Navy: invitation for bids (IFB) No. N62474-85-B-5296 (IFB -5296), for installation of fire protection systems at the Naval Supply Center, Oakland, California; IFB No. N62474-84-B-4753, for repairs to the fuel farm at the Defense Fuel Support Point, Norwalk, California; and IFB No. N62474-86-B-B417, for installation of a fire sprinkler system in Building 221 at the Naval Station, San Diego, California. The protester challenges as unduly restrictive of competition the requirement in each of the

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IFBs that the contractor possess a California fire sprinkler contractor's license. We dismiss as untimely the protest concerning IFB -5296 (Naval Supply Center, Oakland) and deny the other two protests.

Jurisdictional Issues

Allen initially filed its protest under IFB -5296 with the contracting agency on November 11, 1986; bid opening was held as scheduled on November 13. The Navy states, and Allen does not dispute, that it was orally advised that its protest had been denied on November 13, followed by a written denial of the protest received by Allen on November 17. Allen then filed its protest with our Office on December 1.

Where, as here, a protest is first filed with the contracting agency, any subsequent protest to our Office must be filed within 10 working days of actual or constructive knowledge of initial adverse agency action on the protest. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1986). The Navy's decision to proceed with bid opening on November 13 without taking corrective action in response to the protest constituted adverse agency action, 4 C.F.R. § 21.0(e), and since the protest to our Office was not filed until December 1, more than 10 working days later, the protest is untimely. BST Systems, Inc.--Request for Reconsideration, B-218628.2, June 11, 1985, 85-1 CPD ¶ 670. We dismiss the protest concerning IFB -5296.

The Navy also argues that Allen lacks the direct economic interest necessary to qualify as an interested party to maintain the protests because it was the fourth low bidder under all three IFBs. We disagree. A protester is an interested party regardless of its standing in the order of bids where, as here, the protester seeks resolicitation of the procurement on the basis of a defective specification and would have the opportunity to rebid if the procurement is resolicited. Tracor Jitco, Inc., B-220139, Dec. 24, 1985, 85-2 CPD ¶ 710.

Licensing Requirement

Each of the IFBs in part requires installation of a fire sprinkler system and specifies that the contractor^{1/} must have a "valid C-16 State of California fire sprinkler contractor's

^{1/} IFB No. N62474-86-B-B417 (San Diego) was amended to require that the "installer" of the sprinkler system, rather than the contractor, possess the state license.

license." Allen challenges the licensing requirement, arguing that it unduly restricts competition from out-of-state contractors. We find Allen's argument to be without merit.

According to the Navy, there are two reasons for including the licensing requirement in the IFBs: (1) the license is required by the state of California, which has jurisdiction for this purpose over the facilities where the work will be performed; and (2) the seismic area in which the facilities are located calls for special technical skills on the part of sprinkler installers which, in the Navy's view, are better assessed by the state certifying board through the licensing process than by the contracting officials. The protester disagrees with the Navy's justification for the licensing requirement, arguing that California does not have jurisdiction over the facilities involved and that the licensing process does not reflect any special expertise on the part of the sprinkler installer which is not already required by the specifications in the IFB.

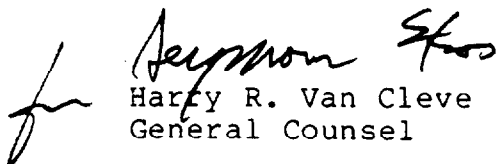
With regard to the significance of California's licensing requirement, Allen's contention that California has no jurisdiction over the facilities where the work is to be performed apparently is based on its belief that a state can never exercise jurisdiction over a federal facility. In fact, a state may enforce a licensing requirement against a federal contractor provided it does not conflict with federal laws or interfere with federal powers. See R.K. Burner Sheet Metal, Inc., B-222799, Apr. 25, 1986, 86-1 CPD ¶ 410. In any event, whether California ultimately would be found to have jurisdiction is not dispositive, since a contracting agency properly may include a local licensing requirement in an IFB where it concludes that contract performance may be delayed due to the state's effort to enforce compliance with the licensing requirement. William B. Jolley, B-208443, Nov. 17, 1982, 82-2 CPD 455; United Security Services, Inc., 53 Comp. Gen. 51 (1973).

A licensing requirement also may be included in an IFB where the contracting officer determines that only performance by a licensed contractor will meet its minimum needs. United Security Services, Inc., supra. Here, the Navy states that the seismic area in which the Navy facilities are located requires technical expertise on the part of the sprinkler contractor which can most effectively be determined through the state's licensing process, a position which on its face is reasonable, in our view. While the protester disagrees with the Navy, it offers no support for its position other than conclusory statements questioning the effectiveness of the licensing process. As a result, we see no basis on which to object to the Navy's determination regarding the value of the licensing requirement in selecting a qualified contractor.

Finally, we find Allen's request for a conference on the protests, first made in its comments on the Navy's reports, to be untimely. Our Bid Protest Regulations require that conferences be held no later than 5 days after receipt of the agency report, and specify that a request for a conference should be made at the earliest possible time in the protest proceedings. 4 C.F.R. § 21.5(a)(b). Thus, as a practical matter, a conference request must be made before the agency report is received in order to schedule the conference within the regulatory timeframe. H.L. Carpenter Co.--Reconsideration, 65 Comp. Gen. 184 (1986), 86-1 CPD ¶ 3. In any event, a conference only provides a forum for an oral exchange between the parties; the protest ultimately is decided only on the written record. Here, Allen had a full opportunity to present its arguments and respond to the Navy's position in its comments on the Navy's reports.

The protester also has asked that we conduct an investigation into the Navy's practice of including a state licensing requirement in procurements for fire sprinkler systems. As discussed above, the protester has shown no basis on which to question the reasonableness of the Navy's decision to include the licensing requirement in the IFBs at issue here. Consequently, we see no reason to review further the Navy's practice in this area.

The protest concerning IFB -5296 is dismissed; the other two protests are denied.


Harry R. Van Cleve
General Counsel